



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER OF PATENTS AND TRADEMARKS
Washington, D.C. 20231
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
-----------------	-------------	----------------------	---------------------	------------------

09/606,925

06/29/2000

James P. Rodrigues

MS

6703

#154645.1/40062.69-US-

23552

7590

03/10/2003

MERCHANT & GOULD PC
P.O. BOX 2903
MINNEAPOLIS, MN 55402-0903

EXAMINER

BARAN, MARY C

ART UNIT

PAPER NUMBER

2857

DATE MAILED: 03/10/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/606,925

Applicant(s)

RODRIGUES ET AL.

Examiner

Mary Kate B Baran

Art Unit

2857

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 December 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-27 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-27 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

BEST AVAILABLE COPY

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____
- 4) ☐ Interview Summary (PTO-413) Paper No(s) _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

DETAILED ACTION

Response to Amendment

1. This action is responsive to the Amendment filed on 18 December 2002. Claims 1-31 are pending. Claims 1, 16, 20 and 24 have been amended.
2. The amendments filed are sufficient to overcome the drawing and specification objections and prior 35 U.S.C. 112 first paragraph rejections of claims 11-15, 19-23 and 26-31. However they are not sufficient to overcome the objections to claims 21 or 31.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1-3, 5, 6, 18 and 19 are rejected under 35 U.S.C. 102(a) as being anticipated by Guinther et al. (U.S. Patent No. 6,016,466).

Referring to claim 1, Guinther et al. discloses a computing system having a mass storage device (see Guinther et al., col. 3 line 66 – col. 4 line 9) and a system timer (see Guinther et al., col. 22 lines 47-49) for obtaining benchmark timing for a portion of an application program execution (see Guinther et al., col. 2 lines 23-31), the application program having permanently inserted performance markers (see Guinther, column 22

Art Unit: 2857

lines 32-35), the computing system comprising: having a mass storage system (see Guinther et al., col. 3 line 66 – col. 4 line 9), an init module for determining if the timestamp data is to be collected during the operation of the application program (see Guinther et al., col. 18 line 64 – col. 19 line 2), a performance marker module for obtaining and storing the timestamp data for later retrieval (see Guinther et al., col. 4 lines 63-67) at predefined points corresponding to the permanently inserted performance markers (see Guinther, column 22 lines 32-35), an uninit module for formatting and storing the obtained timestamp data into a data file within the mass storage device that permits retrieval after the termination of the application program (see Guinther et al., col. 7 line 58 – col. 8 line 20), and a performance benchmark data post processing module for determining the benchmark timing from two or more timestamp data entries (see Guinther et al., col. 22 lines 34-41), wherein an init module is executed before timestamp data is collected (see Guinther et al., col. 18 line 64 – col. 19 line 2), a performance marker module executed each time benchmark timestamp data and overhead timestamp data is to be collected (see Guinther et al., col. 2 lined 23-31), an uninit module is executed after all timestamp data desired has been collected (see Guinther et al., col. 19 line 9-17), and a performance benchmark data post processing module which determines the benchmark timing from timestamp entries (see Guinther et al., col. 19 lines 13-17) stored within the data file (see Guinther et al., col. 20 line 64 – col. 21 line 2).

Referring to claim 2, Guinther et al. discloses an init module for determining if the timestamp data is to be collected (see Guinther et al., col. 18 line 64 col. 19 line 2).

Referring to claim 3, Guinther et al. discloses an init module for determining if the timestamp data is to be collected by checking for the existence of an identification key within a system registry (see Guinther et al., col. 18 line 64 – col. 19 line 2), where the identification key uniquely identifies the processing modules (see Guinther et al., col. 19 lines 13-17) to be used to collect, format, and store the run-time internal state data to be collected (see Guinther et al., col. 18 line 15-24). The examiner interprets the statement “profiling does not occur if the DLL is not present” (see Guinther et al., col. 19 lines 1-2) as disclosed by Guinther et al. to read on the claim limitation “checking for the existence of an identification key within a system registry” (see page 16 lines 13-16).

Referring to claim 4, Guinther et al. teaches the timestamp data comprises a timer count value obtained from the system timer (see Guinther et al., col. 22 lines 47-49).

Referring to claim 5, Guinther et al. discloses a performance marker module which collects timestamp data only if the init module has determined that the timestamp data is to be collected (see Guinther et al., col. 18 line 64 – col. 19 line 2).

Referring to claim 6 Guinther et al. discloses a performance marker module which generates a data record containing a benchmark timestamp data value each time the performance marker module is executed (see Guinther et al., col. 20 lines 37-40).

Referring to claims 13 and 18, Guinther et al. discloses encoding a computer program of instructions for executing a computer process for obtaining run-time internal state data within an application program (see Guinther et al., col. 18 lines 15-24), having the steps: permanently inserting one or more code markers into the application program at locations within the application program corresponding to the point at which benchmark timing data is desired (see Guinther et al., col. 22 lines 24-35), determining if benchmark timing data is to be collected at each code marker by checking for the existence of processing modules identified by an identification key within a system registry (see Guinther et al., col. 18 line 64 – col. 19 line 2), if benchmark timing data is to be collected at each code marker (see Guinther et al., Figure 15), generate a benchmark data record containing the collected benchmark timing data each time the code markers are reached (see Guinther et al., col. 20 lines 37-40), store the benchmark data records within a data memory block (see Guinther et al., col. 7 lines 60-63) within the processing modules identified by the identification key within the system registry (see Guinther et al., col. 18 line 64 – col. 19 line 2), retrieve the benchmark data records from the data memory block for transfer to a mass storage device once all of the run-time internal state data has been collected (see Guinther et al., col. 19 lines 13-17), and process the benchmark data records stored within the mass storage device to

determine the benchmark timing defined between two benchmark data records (see Guinther et al., col. 22 lines 36-41).

Referring to claim 19, Guinther et al. discloses determining if the timestamp data is to be collected by checking for the existence of an identification key within a system registry (see Guinther et al., col. 18 line 64 – col. 19 line 2), where the identification key uniquely identifies the processing modules to be used (see Guinther et al., col. 19 lines 13-17) to collect, format, and store the run-time internal state data to be collected (see Guinther et al., col. 18 line 15-24). The examiner interprets the statement “profiling does not occur if the DLL is not present” (see Guinther et al., col. 19 lines 1-2) as disclosed by Guinther et al. to be synonymous with the claimed phrase “checking for the existence of an identification key within a system registry” (see page 16 lines 13-16).

Referring to claim 20, Guinther et al. discloses determining that benchmark timing data is to be collected by checking for the existence of processing modules identified by the identification key within the system registry (see Guinther et al., col. 18 line 64 – col. 19 line 2).

Referring to claim 21, Guinther et al. discloses a data memory block which is in the processing modules identified by the identification key within the system registry (see Guinther et al., col. 19 lines 17-21).

Referring to claim 22, Guinther et al. discloses benchmark timing determined from the difference between two benchmark timestamp data entries stored within the data file (see Guinther et al., col. 22 lines 36-41).

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 7-12 and 23-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Guinther et al. (U.S. Patent No. 6,016,466) in view of Levine et al. (U.S. Patent No. 6,349,406).

Referring to claim 7, Guinther et al. teaches all but a benchmark data record further containing an overhead timestamp data value each time the performance marker module is executed. Levine et al. further teaches a current event time (i.e. overhead timestamp data) associated with a current trace record (see Levine et al., col. 22 lines 27-29). The examiner interprets the terms "current trace record" (see Levine et al., col. 22 line 29) and "current event time" (see Levine et al., col. 22 line 28) to read on the claimed terms "benchmark data record" and "overhead timestamp data value", respectively (see Levine et al., Figure 20B). It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Guinther et al. to include the teachings of Levine et al., because the overhead timestamp data enables

the skilled artisan to calculate the total overhead value (see Levine et al., col. 22 lines 29-32).

Referring to claim 8, Guinther et al. further discloses a performance marker module which stores the benchmark data records within a data memory block (see Guinther et al., col. 7 lines 60-63) within the processing modules identified by an identification key within the system registry (see Guinther et al., col. 18 line 64 – col. 19 line 2).

Referring to claim 9, Guinther et al. further discloses a unit module which retrieves the data records from the data memory block for transfer to the data file (see Guinther et al., col. 20 lines 37-40) on the mass storage device (see Guinther et al., col. 3 line 66 – col. 4 line 5).

Referring to claim 10, Guinther et al. further discloses determining the benchmark timing from the difference between two benchmark timestamp data entries (see Guinther et al., col. 22 lines 36-41) stored within the data file (i.e. thread database 412).

Referring to claims 11 and 23, Guinther et al. does not teach determining benchmark timing by subtracting an estimate for the total overhead processing from the

Art Unit: 2857

difference between two benchmark timestamp data entries stored within the raw data table.

Levine et al. teaches determining benchmark timing by subtracting an estimate for the total overhead processing from the difference between two benchmark timestamp data entries stored within the raw data table (see Levine et al., col. 24 lines 36-39).

It would have been obvious at the time the invention was made to one of ordinary skill in the art to modify Guinther et al. to include the teachings of Levine et al. because the artisan needs overhead timestamp values to adjust the recorded time values for an accurate measurement of the time (see Levine et al., col. 22 lines 51-55).

Referring to claims 12 and 24, Guinther et al. teaches all but the estimate for the total overhead processing as being determined by totaling the difference between an overhead timestamp value and a benchmark timestamp value for all code markers between the two benchmark timestamp entries used to determine the benchmark timing.

Levine et al. teaches determining the estimate for the total overhead processing (see Levine et al., Figure 23B) by totaling the difference between an overhead timestamp value (i.e. "Call From"/Entry Overhead to Routine A 2356) and a benchmark timestamp value for all code markers between the two benchmark timestamp entries (i.e. base time for routine A 2352, 2372) used to determine the benchmark timing.

It would have been obvious at the time the invention was made to one of ordinary skill in the art to modify Guinther et al. to include the teachings of Levine et al. because

Art Unit: 2857

determining the overhead time enables the artisan to modify the recorded time values for an accurate time measurement (see Levine et al., col. 22 lines 51-55).

Referring to claim 25, Guinther et al. teaches all but a benchmark timestamp value obtained from a system timer immediately after a code marker is reached, and an overhead timestamp value obtained from the system timer immediately before processing returns to the application program from performance marker processing.

Levine et al. teaches obtaining benchmark timestamp value from a system timer immediately after a code marker is reached, and obtaining an overhead timestamp value from the system timer immediately before the processing returns to the application program from performance marker processing (see Levine et al., Figure 20A-B).

It would have been obvious at the time the invention was made to one of ordinary skill in the art to modify Guinther et al. to include the teachings of Levine et al. because overhead timestamp values can be used to compensate for the overtime (see Levine et al., col. 22 lines 51-55).

Referring to claim 26, Guinther et al. further teaches encoded instructions used to implement the computer process (see Guinther et al., col. 18 lines 64-67).

Art Unit: 2857

5. Claim 27 is rejected under 35 U.S.C. 103(a) as being unpatentable over Guinther et al. (U.S. Patent No. 6,016,466) (hereinafter Guinther) in view of Wygodny et al. (U.S. Patent No. 6,282,701) (hereinafter Wygodny).

Referring to claim 27, Guinther teaches all the features of the claimed invention except for a propagated signal on a carrier detectable by a computing system and encoding a computer program of instructions for executing the computer process.

Wygodny teaches a propagated signal on a carrier detectable by a computing system and encoding a computer program of instructions for executing the computer process (see Wygodny, column 5 lines 14-23).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Guinther to include the teachings of Wygodny because having a propagated signal on a carrier detectable by a computing system, and encoding a computer program allows the skilled artisan to analyze the program remotely without exposing the source code to the customer (see Wygodny, column 3 lines 40-44).

Double Patenting

6. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double

Art Unit: 2857

patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claim 1 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 2 of copending Application No. 09/606896 ("the '896 application").

Although the conflicting claims are not identical, they are not patentably distinct from each other.

Claim 1 of the instant application recites: a computing system having a mass storage device and a system timer for obtaining benchmark timing for a portion of an application program execution, having a mass storage system, an init module for determining if the timestamp data is to be collected during the operation of the application program, a performance marker module for obtaining and storing the timestamp data for later retrieval, an uninit module for formatting and storing the obtained timestamp data into a data file within the mass storage device that permits retrieval after the termination of the application program, and a performance benchmark data post processing module for determining the benchmark timing from two or more timestamp data entries, wherein an init module is executed before timestamp data is collected, a performance marker module executed each time benchmark timestamp data and overhead timestamp data is to be collected, an uninit module is executed after all timestamp data desired has been collected, and a performance benchmark data post

processing module which determines the benchmark timing from timestamp entries stored within the data file.

Claims 1 and 2 of the '896 application recite every limitation of the application claim, the only differences being that (a) the instant application stores the collected data in a "data file" whereas the '896 application stores its data in a "Raw Data Table", and (b) the instant application discloses that "the performance marker module is executed each time benchmark timestamp data and overhead timestamp data is to be collected", whereas the '896 application discloses that the performance marker module "is executed at predefined points" to collect timestamp data.

There is no functional difference between storing the data in a "data file", as claimed in the instant application, or storing the data in a "Raw Data Table" as claimed in the '896 application. Similarly, there is no functional difference between executing the performance module marker "each time benchmark timestamp data and overhead timestamp data is to be collected" (instant application) and executing the performance marker "at predefined points" ('896 application), as the "predefined points" ('896 application) would be located where "timestamp data is to be collected" (instant application).

Claim 2, 3 and 5 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 3, 4, and 5 of copending Application No. 09/606896 ("the '896 application"), respectively.

Although the conflicting claims are not identical, they are not patentably distinct from each other.

Referring to claim 2, both the instant application (claim 2) and the '896 application (claim 3) disclose an init module for determining if the timestamp data is to be collected.

Referring to claim 3, both the instant application (claim 3) and the '896 application (claim 4) disclose an init module for determining if the timestamp data is to be collected by checking for the existence of an identification key within a system registry, where the identification key uniquely identifies the processing modules to be used to collect, format, and store the run-time internal state data to be collected.

Referring to claim 5, both the instant application (claim 5) and the '896 application (claim 5), disclose a performance marker module which collects timestamp data only if the init module has determined that the timestamp data is to be collected.

Claims 2, 3 and 5 are dependent on claim 1, and therefore the same reasons for obviousness apply. There is no functional difference between storing the data in a "data file" (instant application) or storing the data in a "Raw Data Table" ('896 application).

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Response to Arguments

7. Applicant's arguments filed 18 December 2002 have been fully considered but they are not persuasive.

Applicant argues that Guinther does not teach permanently adding a performance marker to the code to obtain timestamp data. However, it is the Examiner's position that Guinther does suggest this limitation. Guinther teaches inserting monitoring instructions into the code to collect timestamp data (see Guinther, column 22 lines, 24-41). Guinther also teaches that this code may be entered in a variety of conventional ways, including, "manually inserting the data" (see Guinther, column 22 lines 32-35). Manually inserting the monitoring data into the application code suggests that this code modification is permanent. Further, Guinther does not suggest removing the code after timing data has been gathered.

Applicant further argues that Levine does not teach inserting markers into the code. However, the Examiner uses Guinther to reject this limitation of inserting markers into the source code to collect overhead data. Levine is used to reject the limitations pertaining to collecting benchmark and overhead timestamp data.

Conclusion

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Mary Kate B Baran whose telephone number is (703) 305-4474. The examiner can normally be reached on Monday - Friday from 8:00 am to 5:00 pm.

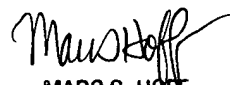
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Marc S Hoff can be reached on (703) 308-1677. The fax phone numbers for

Art Unit: 2857

the organization where this application or proceeding is assigned are (703) 872-9318 for regular communications and (703) 872-9319 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1782.

MKB
March 5, 2003


MARC S. HOFF
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 2800